IN THE SUPREME COURT OF MISSOURI

No. SC 84858

DAVID L. HARJOE,
Respondent,

v.

HERZ FINANCIAL,
Appellant.

On Appeal from the Circuit Court of St. Louis County
21st Judicial Circuit
The Honorable Barbara Ann Crancer, Judge

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE*

This case involves a constitutional challenge to the Telephone Consumer Protection Act of 1991, which prohibits the sending of unsolicited advertisements by fax. Congress enacted the statute in order to protect the owners of fax machines from the expense and inconvenience of having their machines used to print advertisements they are not interested in receiving. The United States has an interest in promoting this purpose by defending the constitutionality of this Act of Congress.

STATEMENT OF THE FACTS

A. Statutory Background.

From 1989 to 1991, Congress considered several bills addressing telemarketing practices made possible by technological innovations, including the transmission of advertisements by fax. In the process, congressional committees held three hearings and produced three reports.[1] Congress

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[1] In the 101st Congress, Congress considered four bills addressing telemarketing practices. See H.R. 628, 101st Cong. (1989); H.R. 2131, 101st Cong. (1989); H.R. 2184, 101st Cong. (1989); H.R. 2921, 101st Cong. (1989); Hearing on H.R. 628, 2131 and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong. (1989). In the 102d Congress, which enacted the statute at issue here, Congress considered six bills. See H.R. 1304, 102d Cong. (1991); H.R. 1305, 102d Cong. (1991); H.R. 1589, 102d Cong. (1991); S. 1410, 102d Cong. (1991); S. 1442, 102d Cong. (1991); S. 1462, 102d Cong. (1991); Hearing on S. 1462 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong. (1991); Hearing on H.R. 1304 and 1305 Before the Subcomm. on

ultimately passed the Telephone Consumer Protection Act (TCPA) in December 1991. Pub. L. No. 102-243, 105 Stat. 2394.

In the provisions of the TCPA at issue here, Congress responded to the dramatic rise in the use of fax machines and the transmission of unsolicited fax advertisements. "An office oddity during the mid-1980's, the facsimile machine has become a primary tool for business to relay instantaneously written communications and transactions." H.R. Rep. No. 102-317, at 10 (1991). By 1991, millions of offices were sending more than 30 billion pages of information each year by fax. See ibid. Congress found that the increasing prevalence of fax machines has been accompanied by an "explosive growth in unsolicited facsimile advertising, or 'junk fax.'" Ibid. Because fax machines are "designed to accept, process and print all messages," ibid, they may be used by unwelcome advertisers as readily as by business clients. Fax machine owners generally have no practical means of restricting access to their machines.

As Congress observed, the exploitation of fax machines by advertisers creates two problems distinct from those associated with sending unsolicited advertisements through traditional media such as leafleting or mail. The recipient of junk mail pays nothing for its solicitations. By contrast, the recipient of fax advertisements "assumes both the cost associated with the use of the facsimile machine, and the

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Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong. (1991); S. Rep. No. 102-177 (1991); S. Rep. No. 102-178 (1991), reprinted in 1991 U.S.C.C.A.N. 1968; H.R. Rep. No. 102-317 (1991). The final bill that became the Telephone Consumer Protection Act combined features of H.R. 1304, S. 1410 and S. 1462.

cost of the expensive paper used to print out facsimile messages." Id. at 25. And because "[o]nly the most sophisticated and expensive facsimile machines can process and print more than one message at a time," the transmission of unsolicited advertisements prevents the fax machine owner from receiving or sending fax messages. Ibid. Such interruptions can last for several minutes at a time. See ibid.

To address the problems associated with fax technology, Congress enacted limited restrictions on the use of fax machines for advertising purposes. Congress did not prohibit advertisers from using fax transmissions. Instead, it required advertisers to obtain the consent of fax machine owners before using their fax lines and shifting advertising costs onto them. The TCPA provision at issue here makes it "unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The statute defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). See also 47 U.S.C. § 227(a)(2) (defining "facsimile machine").

The statute creates a private right of action. Any "person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" an action for injunctive relief or to recover for actual monetary loss or $500 in damages for each violation, whichever is greater. § 227(b)(3). A court may award treble damages for willful or knowing violations. See ibid.

B. Facts and Prior Proceedings.

David Harjoe brought this action alleging that the appellant, Herz Financial, had violated § 227(b)(1)(C) by sending him nine unsolicited fax advertisements over a period of fourteen months. On

cross-motions for summary judgment, the circuit court entered judgment in favor of Harjoe, rejecting Herz Financial's arguments that the statute violates the First Amendment, is unconstitutionally vague, and imposes excessive fines in violation of the Eighth Amendment and the Due Process Clause. The court awarded $9,000 in damages.

Herz Financial appealed. Because the case involves the constitutionality of a statute, the appeal lies in this Court rather than in the Court of Appeals. See Mo. Const. art. V, § 3.[2]

SUMMARY OF ARGUMENT

The Telephone Consumer Protection Act's restrictions on unsolicited fax advertising are consistent with the First Amendment. As the Ninth Circuit held in rejecting the same First Amendment challenge made here, the TCPA is related to a substantial government interest; it directly advances that interest; and it is narrowly tailored. Destination Ventures, Ltd. v. FCC, 46 F.3d 54 (9th Cir. 1995); see also Minnesota v. Sunbelt Communications & Mktg., No. CIV. 02CV770, 2002 WL 31017503 (D. Minn. Sept. 4, 2002); Texas v. American Blastfax, Inc., 121 F. Supp.2d 1085 (W.D. Tex. 2000); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997); but see Missouri ex rel. Nixon v. American Blast Fax, Inc., 196 F. Supp. 2d 920 (E.D. Mo. 2002), appeal pending, Nos. 02-2705, 02-2707 (8th Cir.).[3]

Congress recognized that advertisements by fax pose two significant problems not presented in traditional advertising by mail or leaflet. First, fax transmissions shift part of the advertising costs to the

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[2] Appellant has also raised several non-constitutional issues. The United States takes no position with respect to those issues.

[3] Briefing in the Eighth Circuit has been completed and the case is awaiting argument.

recipient, who picks up the bill for the fax paper, ink and machine maintenance. The process is much the same as if a leafleter requisitioned paper and copying facilities at each house he solicited. Second, each fax advertisement preempts the recipient's fax line for the duration of the advertisement. Thus, the recipient is simultaneously prevented from using his fax machine while being forced to pay to receive an unsolicited ad. These premises of the legislation are supported without contradiction by the legislative record, which includes testimony from state utility regulators, consumer groups, and the ACLU. Appellant questions whether the problem addressed by Congress is real, apparently because it believes that testimony before Congress cannot establish a genuine problem unless it is supported by statistical data. But the government may justify restrictions on commercial speech by relying on any evidence reasonably believed to be relevant, including simple common sense.

Relying on City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), appellant suggests that the TCPA does not directly advance the government's interests because it does not apply to non-commercial faxes. This analysis is based on a fundamental misreading of Discovery Network. That decision does not require Congress to accord equal latitude to commercial and noncommercial speech, which would be inconsistent with the lesser protection afforded commercial speech under the First Amendment. Discovery Network held only that the government may not ban commercial speech when the regulation bears "no relationship whatsoever" to the interests that the government asserted. Id. at 424. In Discovery Network, it was established that the regulation at issue would produce only a "minute" and "paltry" benefit, id. at 417-18, but here, appellant has offered no evidence to refute Congress's finding that the increasing prevalence of fax machines has been accompanied by an explosive growth in unsolicited fax advertising.

The TCPA is also narrowly tailored to advance Congress's interests. It does not ban all fax advertising, but merely requires advertisers to obtain consent before they use other people's fax machines to send their advertisements. The statute also leaves open ample alternative channels of communication.

Finally, the statute is not unconstitutionally vague. Appellant lacks standing to maintain a vagueness challenge, because there is no doubt about how the statute applies to its conduct, and, in any event, the statute provides considerable guidance as to the types of unsolicited transmissions that are within its reach. Nor does the statute violate the Eighth Amendment or the Due Process Clause because it provides for damages of $500 per transmission. The Eighth Amendment's Excessive Fines Clause does not apply here because the civil damages permitted by the statute are not "fines," and the Due Process Clause is not violated because the penalty is not severe, oppressive, or wholly disproportionate to the offense.

ARGUMENT

I. THE TCPA IS CONSISTENT WITH THE FIRST AMENDMENT.

The applicable legal standard is not in dispute. "[C]ommensurate with [the] subordinate position [of commercial speech] in the scale of First Amendment values," Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978), regulations of truthful commercial speech are subject only to intermediate scrutiny. Under this standard, such regulations are valid as long as they serve a substantial governmental interest, directly advance that interest, and are narrowly tailored to serve that interest. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980); Adams Ford Belton, Inc. v. Missouri Motor Vehicle Comm'n, 946 S.W.2d 199, 203 (Mo. banc 1997). As

the Ninth Circuit held in Destination Ventures, Ltd. v. FCC, 46 F.3d 54 (9th Cir. 1995), the TCPA's regulation of fax advertising satisfies this test and therefore must be sustained.

A. Congress Properly Concluded That There Is A Substantial Public Interest In Regulating Unsolicited Fax Advertisements That Shift Advertising Costs To The Recipient While Preempting Fax Lines.

1. As Congress recognized, solicitations by fax differ from mail solicitations in two important respects. "[W]hen an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter." H.R. Rep. No. 102-317, at 25 (1991). All costs are borne by the advertiser. By contrast, when an advertiser sends a solicitation by fax it shifts part of its costs to the recipient, who "assumes both the cost associated with the use of the facsimile machine, and the cost of the expensive paper used to print out facsimile messages." Ibid. As the House Report emphasized, "these costs are borne by the recipient of the fax advertisement regardless of their interest in the product or service being advertised." Ibid; see also S. Rep. No. 102-178, at 2 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1969 ("unsolicited calls placed to fax machines . . . often impose a cost on the called party" because "fax messages require the called party to pay for the paper used"); 135 Cong. Rec. 7886 (1989) (statement of Rep. Shays) (noting constituent complaints regarding junk faxes).

The second distinction between fax solicitation and mail advertisements is that the fax machine is rendered inoperable while the unwanted fax is being transmitted. As the House Report explained, "[o]nly the most sophisticated and expensive facsimile machines can process and print more than one message at a time." H.R. Rep. No. 102-317, at 25; see also S. Rep. No. 102-177, at 20 (1991)

(additional views of Sen. Pressler) ("Unsolicited facsimile advertising ties up fax machines and uses the called party's fax paper); 137 Cong. Rec. 18,123 (1991) (statement of Sen. Hollings) ("These junk fax advertisements can be a severe impediment to carrying out legitimate business practices").

Numerous witnesses before Congress testified to the need for regulation of fax advertising. Thomas Beard, Chairman of the Florida Public Service Commission, testified on behalf of the National Association of Regulatory Utility Commissioners and explained that "[t]he junk fax advertiser is a nuisance who wants to print [its] ad on your paper." Hearing on H.R. 1304 and 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, Science, and Transportation, 102d Cong. 31 (1991). He observed that the "call also seizes your fax machine so that it is not available for calls you want or need," and urged Congress to enact legislation establishing penalties for unsolicited fax advertising. Ibid. Michael Jacobsen of the Center for the Study of Commercialism testified that unwanted faxes "not only use the recipient's paper, but also prevent faxes from being sent out and prevent legitimate faxes from coming in." Hearing on S. 1462 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong. 41 (1991).

Janlori Goldman, representing the American Civil Liberties Union, likewise urged that the proposed restrictions on unsolicited fax advertisements were justified "because of the burden that is placed on the individual who has to pay for the cost of the communication." Hearing on H.R. 1304 and 1305 47. See also id. at 38 (statement of Mark N. Cooper, Research Director, Consumer Federation of America, supporting restriction on unsolicited faxes); id. at 53 (statement of Jack Shreve, Public Counsel for the State of Florida, supporting restriction on unsolicited faxes); Hearing on H.R. 628,

2131 and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong. 54 n.35 (1989) (statement of Professor Robert L. Ellis) ("Extensive research has revealed no case of a company (other than those advertising via fax) which opposes legislation restricting advertising via fax").

2. Congress's "interests in passing the TCPA—preventing 'unwitting customers' from bearing the brunt of advertising costs and preventing unwanted fax machine interference—are substantial and real." Texas v. American Blastfax, Inc., 121 F. Supp. 2d 1085, 1092 (W.D. Tex. 2000). Appellant suggests that the evidence before Congress was inadequate to allow it to conclude that unwanted fax advertisements impose real costs, because Congress relied on "anecdotes." Appellant's Br. 65. Likewise, the district court in Missouri ex rel. Nixon v. American Blast Fax, Inc., 196 F. Supp. 2d 920, 929 (E.D. Mo. 2002), appeal pending, Nos. 02-2705, 02-2707 (8th Cir.), upon which appellant relies, was concerned that "Congress did not consider any studies or empirical data." But the government may justify restrictions on commercial speech "based solely on history, consensus, and 'simple common sense.'" Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992)). As the Supreme Court recently stressed in a closely analogous context, the government "may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest." City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S. Ct. 1728, 1736 (2002) (quotation marks and citation omitted) (emphasis added); see also Texas v. American Blastfax, 121 F. Supp. 2d at 1091-92 (In enacting the TCPA, "Congress legitimately relied upon the testimony from authorities, as well as the contemporaneous state laws and media reports") (quoting Destination Ventures v. FCC,

844 F. Supp. 632, 637 (D. Or. 1994), aff'd, 46 F.3d 54 (9th Cir. 1995)).[4]

The interests underlying the TCPA are comparable to the wide range of interests that have satisfied this aspect of intermediate scrutiny. For example, in Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit rejected a First Amendment challenge to a state statute requiring callers to obtain the consent of the called party before sending a prerecorded telephone message. The Court explained that the interests advanced by the statute—the "efficient conduct of business operations" and "[r]esidential privacy" are both "significant government interest[s]." Id. at 1554; cf. Florida Bar, 515 U.S. at 625 (State has substantial interest in protecting "potential clients' privacy" by regulating solicitation by lawyers); United States v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993) (Congress has substantial interest in regulating lottery advertisements to balance the policies of some States to prohibit lotteries and other States to allow them); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (city has substantial interest in regulating billboard advertisements to promote aesthetics and traffic safety).

3. Appellant suggests that these interests are less substantial than they were when the statute was enacted in 1991. Although it pointed to the increased use of computer networks to send and receive faxes, it presented no evidence of how prevalent such networks are. In any case, unwanted fax

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[4] Alameda Books addressed the validity of a time, place, or manner regulation of noncommercial speech. But as the Supreme Court has made clear, "the validity of time, place or manner restrictions is determined under standards very similar to those applicable in the commercial speech context." United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993).

advertisements sent to computer networks can impose substantial burdens on recipients. Appellant also speculates that features such as increased memory, number blocking, and dual access lines may reduce the burden on fax owners from unwanted fax advertisements. But increased memory does not permit a fax owner to send or receive a fax while another fax is coming in; number blocking does not stop fax advertisements from unknown or unexpected senders; and there is no evidence that a significant percentage of fax owners have multiple phone lines. Perhaps future technological developments will mitigate the problems associated with unwanted faxes, but "speculat[ion] upon what solutions may turn up in the future" does not undercut the government's current interest in preventing cost-shifting from fax advertisers to unconsenting fax owners. Destination Ventures, 46 F.3d at 57.

More fundamentally, appellant's premise is flawed. The First Amendment does not require Congress to update the U.S. Code on an annual or bi-annual basis, holding hearings and taking testimony to determine whether its statutes are still valid. To be sure, at a certain point changed circumstances might require invalidation of a statute that no longer serves its intended purpose. But in the absence of any reason to believe that circumstances in the fax industry have changed greatly—and appellant has not shown that they have—the government is entitled to rely on Congress's findings about the need for legislation. See, e.g., City of Erie v. Pap's A.M., 529 U.S. 277, 297-98 (2000) (plurality opinion) (legislative findings dating back a century are a legitimate basis for speech restrictions, where litigants have not "cast any specific doubt on the validity of those findings"). In any event, the relevant factual circumstances are essentially the same as those that existed when the Ninth Circuit upheld the TCPA in Destination Ventures.

B. The TCPA Directly Advances The Government's Interests.

There can be no serious dispute that the TCPA directly advances the substantial interests identified by Congress. Congress sought to prevent the shifting of advertising costs and preemption of fax lines. As the Ninth Circuit held in Destination Ventures, the requirement that advertisers send their faxes only to willing recipients directly advances both of these concerns. See 46 F.3d at 56. Appellant complains that the TCPA is not as effective as possible because it does not sweep broadly enough. In particular, appellant notes that the act does not apply to faxes that convey political messages or other forms of non-commercial speech, and that it does not prohibit all telephone solicitations. Neither feature of the statute in any way undermines its validity.

1. Appellant suggests that, as in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), the statute's distinction between commercial and noncommercial speech means that it produces no benefits. But this case is nothing like Discovery Network. In Discovery Network, the City of Cincinnati, motivated by aesthetic and safety considerations, prohibited newsracks that dispensed commercial handbills but allowed all other types of newsracks. See 507 U.S. at 414. As a result of this distinction, only 62 news racks were removed and 1,500 to 2,000 were permitted to remain. See id. at 414, 418. In invalidating the city's action, the Supreme Court stressed that "[t]he benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place" was "minute" and "paltry." Id. at 417-18. The Court ruled that the City's distinction between commercial and noncommercial speech thus bore "no relationship whatsoever" to the interests that the city had asserted. Id. at 424.

Discovery Network does not bar the government from according greater latitude to

noncommercial speech than commercial speech. That result would be flatly at odds with the "subordinate position [of commercial speech] in the scale of First Amendment values." Ohralik, 436 U.S. at 456. Nor does the First Amendment mean that the Congress may not begin to deal with a problem unless it solves the entire problem at once. On the contrary, the Supreme Court has repeatedly emphasized that government may "address some offensive instances and leave other, equally offensive, instances alone." R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992); see also Watchtower Bible & Tract Soc'y, Inc. v. Village of Stratton, 122 S. Ct. 2080, 2089-90 (2002) (suggesting that ban on door-to-door solicitation limited to commercial solicitation would be permissible, although blanket ban was not). As the Court explained in R.A.V., "the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." 505 U.S. at 387. In other words, the First Amendment does not "require that the Government make progress on every front before it can make progress on any front." Edge Broadcasting, 509 U.S. at 434.

Appellant has not disputed that unsolicited commercial fax solicitations constitute the majority of unsolicited faxes and are responsible for the bulk of the cost-shifting onto fax owners. Cf. Destination Ventures, 46 F.3d at 56. And to the extent that there are a small number of commercial solicitations that fall outside the broad definition in 47 U.S.C. § 227(b), there is no evidence that their frequency or intrusiveness is more than de minimis. Congress therefore had a reasonable basis for concluding that restricting junk faxes would directly and materially ameliorate the problem it sought to address. Cf. Southlake Property Assocs., Ltd. v. City of Morrow, 112 F.3d 1114, 1116 (11th Cir. 1997) (upholding ban on commercial, but not non-commercial, off-site billboards); National Adver. Co. v.

City of Denver, 912 F.2d 405, 409 (10th Cir. 1990) (same).

2. Appellant criticizes the TCPA's failure to prohibit live telephone advertising, but this feature of the TCPA reflects Congress's carefully considered judgment about how best to balance the privacy and property interests of fax and telephone owners against the commercial and speech interests of would-be solicitors. Congress prohibited solicitations in which the message was communicated automatically—i.e., fax advertisements and solicitations that use "an artificial or prerecorded voice to deliver a message"—unless the sender has first obtained the recipient's consent. See 47 U.S.C. § 227(b)(1)(B),(C). Congress also prohibited solicitations that impose out-of-pocket costs on the recipient—i.e., fax solicitations and solicitations made to a telecommunications "service for which the called party is charged for the call"—without the recipient's prior consent. See § 227(b)(1)(A)(iii), (C). In contrast, Congress permitted live telephone solicitations without the customer's prior consent unless the customer has registered an objection to being contacted. See § 227(c); see also 47 C.F.R. § 64.1200(e)(2)(iii).

In imposing more stringent restrictions on automated solicitations than on live solicitations, Congress emphasized their heightened intrusiveness as a result of the inability of machines to "interact with the customer except in preprogrammed ways." S. Rep. No. 102-178, at 4, reprinted in 1991 U.S.C.C.A.N. at 1972. Thus, automated fax and telephone solicitations "do not allow the caller to feel the frustration of the called party." Ibid; see also Van Bergen, 59 F.3d at 1554 (automated telephone solicitations are "uniquely intrusive due to the machine's inability to register a listener's response"). While the recipient of a live telephone solicitation may "tell the operator, at any point in the conversation, that he does not want to hear from the calling person or entity again," the recipient of a

fax or automated telephone solicitation cannot register his objection no matter how lengthy the communication, "and may be obliged, against his will, to respond over and over to the same unwanted caller." Van Bergen, 59 F.3d at 1555. Unsolicited fax advertisements compound this intrusion, moreover, by commandeering the property of the recipient to communicate the unwanted advertisement.

It is entirely constitutional for Congress to give wider latitude to interactions between human beings than to solicitations by machine. See Moser v. FCC, 46 F.3d 970 (9th Cir. 1995) (upholding ban on prerecorded telephone solicitations even though Congress had not prohibited other telephone solicitations). In regulating commercial speech, Congress may consider the different burdens and benefits imposed by automated and live solicitations, and it may regulate accordingly. Of course, even apart from Congress's ability to consider these different burdens and benefits, any "underinclusiveness" in the TCPA would not violate the First Amendment unless it "represent[ed] an 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" Moser, 46 F.3d at 974 (quoting City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994)). Because the ban on fax advertisements, like the ban on automated telephone solicitations upheld in Moser, "is not an attempt to favor a particular viewpoint," 46 F.3d at 974, Congress's decision not to ban live telephone solicitations does not undercut the legitimacy of its decision to ban fax solicitations.

C. The Requirement That Advertisers Obtain Consent For Transmission Of Fax Advertisements Is Narrowly Tailored To Advance The Interests Identified By Congress.

1. Under the intermediate scrutiny that applies to regulations of commercial speech, a

regulation need only "'promot[e] a substantial government interest that would be achieved less effectively absent the regulation.'" Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). The Supreme Court has made clear that this test is "substantially similar" to the test for time, place, and manner restrictions, and requires "something short of a least-restrictive-means standard." Board of Trustees v. Fox, 492 U.S. 469, 477 (1989); accord Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001). Accordingly, Congress was not required, in protecting fax owners from the burdens imposed by unsolicited advertisements, to consider every potential method of carrying out that goal and to select the alternative that arguably restricted the least amount of speech. See Fox, 492 U.S. at 478 (government need not consider and eliminate "all less restrictive alternatives"). On the contrary, the fit between Congress's interests and § 227(b) was required only to be "reasonable," so that the scope of speech restrictions was not "substantially excessive" in comparison to the interests served. Fox, 492 U.S. at 479.

Appellant relies heavily on Thompson v. Western States Medical Center, 122 S. Ct. 1497 (2002), for the proposition that intermediate scrutiny requires the government to select the "least restrictive means" of accomplishing its interest. That case was very different from this case, because it involved a content-based ban on advertising of lawful conduct. In Thompson, Congress had prohibited pharmacies from advertising "compounded" drugs, which are specially made by a pharmacist or doctor for an individual patient, in order to deter large-scale drug compounding in circumvention of the government's new-drug approval process. Although the advertising itself was not the cause of the harm sought to be avoided, it served as "a fair proxy" for "large-scale manufacturing" of compounded drugs. Id. at 1505. The Thompson Court held that this flat ban on truthful advertising failed to satisfy

intermediate scrutiny. Id. at 1506-07. The Court emphasized that the Food and Drug Administration's own enforcement history provided examples of a variety of regulations of conduct that could have discouraged large-scale drug compounding without restricting speech. Before Congress could impose a blanket ban on lawful speech, the Court held, it was required to consider these obvious and apparently adequate alternatives that did not restrict speech at all.

Unlike the statute at issue in Thompson, the TCPA is not a flat ban on advertising, but merely a regulation of one manner of sending advertisements. It is intended not to deter other conduct but to prevent cost-shifting harms imposed by the advertising itself. The Constitution does not preclude Congress from enacting a restriction on commercial speech directly related to its regulatory goal even if alternative means, preferred by certain advertisers, would also be available. See Fox, 492 U.S. at 479-80. As the Supreme Court has recently reaffirmed, intermediate scrutiny does not require the government to disprove the efficacy of all alternative methods of regulation. See Alameda Books, 122 S. Ct. at 1735-36 (plurality opinion); id. at 1742-43 (Kennedy, J., concurring in the judgment).

2. The TCPA satisfies intermediate scrutiny because its scope conforms closely to the problem at which the statute was directed. As noted, the TCPA does not ban all fax advertisements. Instead, Congress has required only that fax advertisers obtain consent before shifting their costs and preempting fax lines. To comply with this provision, advertisers need not obtain the consent of recipients for each separate transmission. A company seeking to advertise by fax can simply ascertain which businesses and individuals are willing to be placed on its transmission list. Individuals and businesses interested in receiving solicitations can consent. Those who wish to keep their lines open, or

to avoid cost-shifting, may decline. But there is nothing to stop prospective fax advertisers from seeking consent through bulk mailings or live telephone calls, for example, which are "inexpensive and effective" channels of communication that remain open under the statute. Van Bergen, 59 F.3d at 1556. Contrary to the suggestion of the district court in Missouri v. American Blast Fax, these are "practical way[s] for companies to gain permission" to send faxes. 196 F. Supp. 2d at 933 n.26.

Appellant does not contend that the First Amendment gives advertisers a right to send fax advertisements to unconsenting fax owners. Thus, even by appellant's own account, the only question is whether Congress was constitutionally required to require fax owners to take affirmative steps to withhold consent, or whether it could, as a matter of legislative judgment, place the burden on advertisers to seek the consent of fax owners. Nothing in the First Amendment suggests that Congress was required to place the burden on consumers rather than on the businesses seeking to use fax owners' machines for their own purposes.

Appellant suggests that Congress might have chosen other mechanisms for regulating unsolicited fax advertising, such as by restricting the hours that unsolicited faxes may be sent, or by establishing a national "no-fax" list under which consumers would bear the burden of registering their objections to fax advertising. Appellant apparently believes that the alternatives it described would be equally effective at promoting the government's objectives. Congress, however, made a different determination. Congress recognized that, under the TCPA, "telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages." S. Rep. No. 102-178, at 8, reprinted in 1991 U.S.C.C.A.N. at 1975. Congress found that "such a responsibility" is "the minimum necessary to protect unwilling recipients from receiving fax messages

that are detrimental to the owner's uses of his or her fax machine." Ibid. That determination was eminently reasonable, when the uncontradicted testimony before Congress revealed that "business owners are virtually unanimous in their view that they do not want their fax lines tied up by advertisers trying to send messages." Hearing on H.R. 628, 2131, and 2184 54-55 (statement of Professor Robert L. Ellis). Indeed, many States have reached the same conclusion that Congress did and have prohibited unsolicited fax advertising outright or where the recipient has no prior contractual or business relationship with the sender. See, e.g., Conn. Gen. Stat. Ann. § 52-570c; Fla. Stat. Ann. § 365.1657; Ga. Code Ann. § 46-5-25; Idaho Code § 48-1003(i); 51 La. Rev. Stat. Ann. § 1746; 10 Me. Rev. Stat. Ann. § 1496; Utah Code § 13-25a-104; Wis. Stat. Ann. § 134.72.

There is no constitutional basis for second-guessing Congress's judgment. On the contrary, the Supreme Court has repeatedly rejected the notion that the government must "provide evidence that not only supports the claim that its [regulation] serves an important government interest, but also does not provide support for any other approach to serve that interest." Alameda Books, 122 S. Ct. at 1736. Consistent with this principle, this Eighth Circuit in Van Bergen expressly rejected the argument that the possibility of establishing a "database of persons who do not wish to receive" prerecorded telephone calls could provide a basis for invalidating a state statute that, like the TCPA, placed the burden on the entity initiating the call to obtain the recipient's consent. 59 F.3d at 1555 n.13. See also Texas v. American Blastfax, 121 F. Supp. 2d at 1092 ("possible alternatives do not show the TCPA's ban on unsolicited fax advertisements is an unreasonable 'fit' for the interests directly advanced by the ban"); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1168 (S.D. Ind. 1997) (the mere existence of "some imaginable alternative" does not establish that the TCPA is improperly tailored to achieve

Congress's purposes) (quoting Ward, 491 U.S. at 797).

II. THE TCPA'S RESTRICTION ON FAX ADVERTISING IS NOT UNCONSTITUTIONALLY VAGUE.

The TCPA makes it unlawful for any person to send an "unsolicited advertisement" to a fax machine. 47 U.S.C. § 227(b)(1)(C). The statute defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." § 227(a)(4). Appellant contends that this definition is unconstitutionally vague. But appellant lacks standing to raise a vagueness challenge because it has failed to show that there is any uncertainty about how the statute should be applied to its conduct. And in any event, the vagueness challenge should be rejected on the merits because the statute's meaning is clear.

A. As a general rule, a party "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982); see also Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). For this reason, "on a challenge that a statute is unconstitutionally vague, 'it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing.' Rather, the language is to be evaluated by 'applying it to the facts at hand.'" State v. Mahan, 971 S.W.2d 307, 312 (Mo. banc 1998) (quoting State v. Young, 695 S.W.2d 882, 883-84 (Mo. banc 1985)). To be sure, under the First Amendment there are certain circumstances in which a party may argue that a statute should be invalidated on the ground that it is unconstitutional as applied to a third party. But this "overbreadth" doctrine does not apply to commercial speech. See Waters v.

Churchill, 511 U.S. 661, 670 (1994) ("Nor has the possibility that overbroad regulations may chill commercial speech convinced us to extend the overbreadth doctrine into the commercial speech area"); Excalibur Group, Inc. v. City of Minneapolis, 116 F.3d 1216, 1225 (8th Cir. 1997).

In this case, appellant does not dispute that its faxes constituted "material advertising the commercial availability or quality of any property, goods, or services." And although it questions the evidentiary sufficiency of the district court's factual conclusion that the faxes were sent without "prior express invitation or permission," see Appellant's Br. 98-99, it does not argue that the alleged vagueness of that legal standard is in any way relevant to this case. Appellant therefore lacks standing to raise a vagueness challenge.

B. Even if appellant had standing, its vagueness challenge has no merit. A statute is not unconstitutionally vague unless persons "of common intelligence must necessarily guess at its meaning and differ as to it application." Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984) (emphasis added) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). Whether persons of common intelligence could reasonably disagree about a statute's meaning or application is irrelevant; otherwise, the vagueness test would turn every disputed issue of statutory interpretation into a basis for invalidating the law. Cf. Broadrick, 413 U.S. at 608. Rather, the test is simply "whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955, 957 (Mo. banc 1999). And courts afford even greater leeway when evaluating civil rather than criminal statutes, "because the consequences of imprecision are qualitatively less severe." State ex rel. Nixon v. Telco Directory Publ'g, 863 S.W.2d 596, 600 (Mo. banc 1993).

Appellant presents several hypothetical cases in which it claims it is uncertain whether the TCPA applies, see Appellant's Br. 82, and it points to a case in which the statute's application has been disputed, see id. at 83. This shows nothing more than that the interpretation of the statute has provoked disagreement in the past and might do so in the future. But again, not every dispute over statutory interpretation means that a statute is void for vagueness. Appellant has not come close to showing that the TCPA's fax advertising restriction cannot readily be applied in most cases. On the contrary, the statute provides considerable guidance as to the types of unsolicited transmissions that are within its reach. Appellant therefore has no basis for challenging the statute on vagueness grounds.

III. THE TCPA'S DAMAGES PROVISIONS DO NOT VIOLATE THE EIGHTH AMENDMENT OR THE DUE PROCESS CLAUSE.

The TCPA authorizes a person or entity injured by a violation to sue "to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(b)(3)(B). "If the court finds that the defendant willfully or knowingly" committed a violation, "the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount" otherwise available. § 227(b)(3). Appellant suggests that this provision violates the Eighth Amendment and the Due Process Clause. Neither claim has merit.

A. The Eighth Amendment provides in relevant part that "excessive fines [shall not be] imposed." In the context of the amendment, the word "fine" means "a payment to a sovereign as punishment for some offense." United States v. Bajakajian, 524 U.S. 321, 327-28 (1998) (emphasis added) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)). Thus, the Eighth Amendment's Excessive Fines Clause does not limit the amount of damages

that may be awarded to a private litigant. See Browning-Ferris, 492 U.S. at 268 ("[T]he Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government"); accord Hoskins v. Business Men's Assurance, 79 S.W.3d 901, 904 (Mo. banc 2002). In this case, "the government neither has prosecuted the action nor has any right to receive a share of the damages awarded," Browning-Ferris, 492 U.S. at 264, so the Eighth Amendment does not apply.

B. Appellant claims that the damages provided by the TCPA are "completely out of proportion" to the "few pennies in cost" of an unsolicited fax, and that the statute therefore violates the Due Process Clause. Appellant's Br. 86. This argument is foreclosed by St. Louis, Iron Mountain & Southern Railway Co. v. Williams, 251 U.S. 63 (1919). In that case, the Supreme Court considered a statutory penalty of up to three hundred dollars that was awarded against a railway for charging a passenger 66 cents more than the lawful rate. Id. at 63-64. The Court stressed that the government has "a wide latitude of discretion" in setting statutory penalties, which must be sustained unless "the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." Id. at 66-67. Although the challenged award "of course seem[ed] large" when contrasted with the overcharge, the Supreme Court emphasized that "its validity is not to be tested in that way." Id. at 67. Instead, it must be "considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates." Ibid. The Court held that under this analysis, the award could not "be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable," and it therefore did not violate the Due Process Clause. Ibid.

Applying this test, the TCPA's damages provisions are plainly constitutional. As the district

court explained in Kenro, "Congress was concerned with more than the cost of fax paper when it established the $500 statutory damages remedy." 962 F. Supp. at 1166. "Congress designed a remedy that would take into account the difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements, effectively deter the unscrupulous practice of shifting these costs to unwitting recipients of 'junk faxes', and provide adequate incentive for an individual plaintiff to bring suit on his own behalf." Ibid. (internal quotation marks and citation omitted). See also Texas v. American Blastfax, 121 F. Supp. 2d at 1090 ("What Blastfax appears to overlook is that the TCPA damages provision was not designed solely to compensate each private injury caused by unsolicited fax advertisements, but also to address and deter the overall public harm caused by such conduct."). Even if some applications of the statutory damages provision could conceivably raise due process concerns—e.g., the multi-million-dollar verdict cited by appellant, see Appellant's Br. 87—this case does not involve any such application. The court's award of $9,000 in damages for illegal fax transmissions on nine separate occasions cannot plausibly be viewed as severe or oppressive.

Appellant relies on cases such as BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), which addressed the due process limits on punitive damages awarded by juries. Those cases are inapposite. As the Supreme Court has explained, "[t]he review of a jury's award for arbitrariness and the review of legislation surely are significantly different." TXO Prod. Corp., 509 U.S. at 456. The Court's principal concern in BMW was whether the defendant had "adequate notice of the magnitude of the sanction" that might be imposed, 517 U.S. at 574—an issue that is not present when the damages award has been set by statute.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND CONSENT

I certify that this brief complies with the length limitations of Rule 84.06(b) and that the brief contains no more than 8,723 words. I also certify that the computer disk containing the text of this brief has been scanned for viruses and is, to the best of our ability and technology, virus-free.

I further certify that I have consulted with counsel for all parties to this appeal (Ms. Mary Ann L. Wymore for Appellant and Mr. Max Margulis for Respondent), and all parties have consented to the filing of this brief.

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I certify that on November 25, 2002, I filed and served the foregoing brief by causing eleven copies to be sent by Federal Express to the Clerk of the Court, and by causing two copies to be sent by Federal Express to the following counsel:

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